CASE NO. 93-101

JUN 25 1993
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IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1993

DONALD B. GATES, and
EVA M. GATES — PETITIONERS

v.

PORT SAN LUIS HARBOR DISTRICT; JACK RODIN, JR.; MARLIN STEBBINS; NORMAN COY, JR.; MATT COLLAR; BILL BARROW; WILLIAM KING; STEWART JENKINS; GERARD PARSONS; JIM CHAMBERS; JIM BLECHA; and DENNIS JOHANSEN

RESPONDENTS

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX

PETITION FOR WRIT OF CERTIORARI

DONALD B. GATES and
EVA M. GATES
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Petitioners Appearing in Propria Persona

QUESTIONS PRESENTED FOR REVIEW

Whether the trial court deprived Petitioners of Due Process and Equal Protection of the law under the Fourteenth Amendment of the United States Constitution, by depriving Petitioners of legal counsel; tampering with the jury and jury instructions; and improperly switching jury verdict forms resulting in misconduct amounting to a crime against public justice under Title 18, Section 1503 and 1505 of the United States Code, California Government Code 6200-6201, California Penal Code 115, 182 and 184.

Whether the trial court deprived Petitioners of Due Process and Equal Protection of the law under the Fourteenth Amendment of the United States Constitution by depriving Petitioners of their claim for recovery by failing to follow applicable California Tort Claim law.

Whether the trial court deprived Pe-

titioners of Due Process and Equal Protection of the law under the Fourteenth Amendment to the United States Constitution by improperly discriminating against petitioners and having improper ex-parte communications with counsel for opposing parties.

Whether the trial court deprived Petitioners of Due Process and Equal Protection of the law under the Fourteenth Amendment to the United States Constitution by failing to take steps to fully disclose matters to Petitioners and properly inform the jury in order to avoid a miscarriage of justice.

Whether the trial court deprived Petitioners of Due Process and Equal Protection of the law under the Fourteenth Amendment to the United States Constitution by failing to apply the doctrine of joint and several liability in determining proper parties and damages.

Whether the appellate court deprived

Petitioners of Due Process and EqualPro-
tection of the law under the Fourteenth
Amendment of the United States Constitution
by failing to render a decision on conspiracy
and misconduct of court and counsel as to un-
lawful interference with court proceedings
and due administration of justice; by fail-
ing to render a decision, adhere to law and
follow precedent of prior Supreme Court de-
cision on same point of law; by its misin-
terpretation and failure to follow applica-
ble state statutes and law constitutes dis-
criminarion against Petitioners where if
followed would have furnished a protection
guaranteed by the constitution.

Whether, short of other lawsuits being
filed, this court is the only source of re-
lief available to Petitioners and the only
court with the power and authority to act
on the seriousness of what court and counsel
have perpetrated against the public and its
adverse effect on the court's loss of judic-

ial reputation by their actions. These issues are important enough to warrant Supreme Court attention and petitioners request a general review of the entire case, as it came out of the court of appeals and the San Luis Obispo County Superior Court, and not restrict the review to only the federal questions presented, pursuant to 28 USC 1651.

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CASE NO. _____

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PORT SAN LUIS HARBOR DISTRICT; JACK RODIN, JR.; MARLIN STEBBINS; NORMAN COY, JR.; MATT COLLAR; BILL BARROW; WILLIAM KING; STEWART JENKINS; GERARD PARSONS; JIM CHAMBERS; JIM BLECHA; and DENNIS JOHANSEN

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX

Donald B. Gates and Eva M. Gates, petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Second Appellate District, Division Six.

Opinions Below

The Opinion of the Court of Appeal, dated December 9, 1992, whose judgment is herein sought to be reviewed, is Civil No. B057338 App.1a; San Luis Obispo county Superior Court No. 61331. The Court of Appeal denied Rehearing on January 5, 1993, App.69a. On March 15, 1993, the California Supreme Court filed extension of time, App.71a; for Review on March 31, 1993, App.77a. Petitioners filed Motion for Stay of Issuance of Remittitur on March 26, 1993. The Court of Appeal issued Remittitur on April 5, 1993, App.78a, and denied Petitioners Motion for Stay of Remittitur on April 6, 1993 based on grounds of "No Jurisdiction," App.79a. The Opinion is unpublished and is re-printed in the separate appendix to this petition, App.1a.

Judgment after trial by jury, filed January 28, 1991 and interlocutory judgments and orders of the lower court of appeals and others omitted from the Opinion, reprinted in the separate appendix to this petition, App.46a-86a.

STATEMENT OF JURISDICTION

Jurisdiction is conferred upon this Honorable Court by 28 USC 1257(a); 1254(1);1331;1651 and 2403(b) of the United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

U.S. Constitution, Amendment 14. App.187a; California State Constitution, Article VI, Section 13, App.191a; 18 USC 1503, App.234a and 18 USC 1505, App.235a.

STATEMENT

Preliminarily, petitioner respectfully requests the Court to note that time is of the essence in this case. The statute of limitations will expire December 31, 1993, for filing suit against the judges, San Luis County Superior Court, defendants and their counsel, in the event the agencies who have jurisdiction fail to prosecute the issues. Petitioners are ready to meet any schedule for briefing and oral argument that the Court may set.

STATEMENT OF THE CASE

In October 1985, the Gates brought their vessel, the Endless III, which is their home, to Port San Luis Harbor District for cleaning and applying anti-fouling paint to the bottom of the boat. The contract with the Port was for hauling the vessel, only. During the contracted employment for the haulout defendants

damaged the vessel while in defendants custody and control.

The Gates filed this action on April 17, 1986 against the District, a public entity, five of its employees, its Chief Executive Officer and its Board of Commission for negligence, res ipsa loquitur, premises liability, breach of contract, bailment, special and consequential damages; emotional distress, loss of use and diminution in value. Gates attached a copy of the contract, which contains a unilateral attorney fee and cost agreement, to the complaint App.213a. The District, only, filed a cross-complaint against both plaintiffs, for payment on the contract with Donald B. Gates.

For five years the lower court prevented this case from coming to trial. After motion to set a trial date, the Presiding Judge, Warren C. Conklin, set a

trial date for March 20, 1990. The attorneys stipulated to continue the trial date to July 17, 1990, App.80a-83a. At the scheduled time for trial, neither attorney appeared in court. Plaintiffs, being present in court, intervened when Judge Conklin was in the process of taking the case off the civil active list, and obtained a new trial date of December 3, 1990. Thereafter the court granted plaintiffs' attorney permission to withdraw, 70 days before the new trial date of December 3, 1990. The court subsequently denied plaintiffs, motion to reopen discovery even though plaintiffs were forced to prepare the case for trial themselves App.84a-87a. This matter was brought to the attention of the court of appeal, AOB 26-27, ARB 17. Due to the five year rule to bring a case to trial, plaintiffs were forced to accept the only visiting judge offered by the court.

Trial by jury ensued in the temporary courtroom in the Veteran's Memorial Building with visiting judge R. Donald Chapman presiding, on negligence, premises liability and breach of contract, as to the District and Jack Rodin, Jr. only, the court having dismissed all other defendants by summary judgment, summary adjudication, judgment on the pleadings, nonsuit and directed verdict, app.56a-66a.

During trial Judge Chapman coerced petitioners into withdrawing common carrier, Count 2, of the Bailment cause of action of the Complaint. No written request for dismissal of bailment cause of action was submitted, nor was an order issued. The jury was not properly charged regarding bailment and did not render a decision on this cause of action. This was brought to the attention of the trial court in Plaintiffs' Objection filed on January 2, 1991, App.126a, and brought to

the court of appeal's attention, AOB 17-18. The appellate Opinion made the determination the trial court should have made, that Port San Luis Harbor District is a common carrier, App.33a-34a, therefore within the doctrine of strict liability.

The court hired the visiting judge for 5 days. Both parties had estimated the trial would require eight days to two weeks. The judge being unavailable forced petitioners to accept an 18 day adjournment before their case in chief had been completed. A second adjournment of 4 days was granted by the court after the reading of jury instructions. The instructions read by the trial judge on December 28, 1990, before the adjournment, were not reread to the jury prior to deliberation on January 2, 1991.

The trial court refused to give plaintiffs' requested jury instructions, "Concurring Causes", Baji 3.77, 3.78,

3.80, App.128a, 204a-206a, and Baji 3.45, App.127a,202a, "Violation of Statutes, Ordinances and Safety Orders, stating, "I can't deal with the huge pile of randomly selected code sections in this matter." The court of appeal did not render a decision on the issue of erroneous instructions and misstates facts as to the California Safety Order instructions requested. The trial court denied plaintiffs' Motion for reconsideration of Jury Instructions filed on January 2, 1991.

The "Concurring Causes" issue was brought to the trial court's attention the night of December 27, 1990, during selection of jury instructions and again on the morning of the 28th, the 8th day of trial. The issue was brought to the attention of the court of appeal in AOB 2-33; ARB 11-13,35.

On December 28, 1990, the trial judge drafted special verdicts, requesting de-

fense counsel's office prepare them. Judge Chapman presented the approved special verdict forms to the jury, in the jury room. These special verdict forms contained a finding as to each cause of action and enforceability of defendants' exculpatory clause in their contract, TT1593.

Between December 28, 1990 and December 31, 1990 these original special verdict forms were removed from the locked evidence room and switched to a general verdict form for one finding, compensatory damage. The general verdict forms plaintiffs found in the file on December 31, 1990 did not contain the question as to enforceability of defendants exculpatory clause or findings on each cause of action of the complaint. The trial judge did not rule, as a matter of law on the legal issue, and determined the question of enforceability of the exculpatory clause

would be a jury issue. The switching of the special verdict forms to general verdict forms, altered public records, tampered with the jury and unlawfully interfered with proceedings of the court.

This crime, which occurred between 5:15 p.m., Friday, December 28, 1990 and 1:00 p.m., Monday, December 31, 1990 confirmed the cumulative indiscretions and discrimination committed against plaintiffs because defendants are a local public entity. This brings forth the question: "Have the courts and attorneys conspired to defraud throughout litigation and trial, to deprive petitioners of due process and equal protection under the law?" Penal Code 182,184 App 199-201a.

Plaintiffs first notified the court on December 31, 1990 by phoning Warren C. Conklin, presiding judge of the superior court, of the unlawful interference and switching of verdict forms, out of court

and off the record. He was to sit for the trial judge, to hear, and take the jury verdict on January 2, 1991. Plaintiffs were advised to appear in his chambers, "to try to get it worked out" before the jury commenced deliberation at 9:00 a.m. on January 2, 1991. Petitioners filed objection to the switched verdict forms on January 2, 1991 App.126a. The court, having been notified of the unlawful interference of proceedings of the court failed to investigate, report the crime or sanction those involved in the contempt.

Plaintiffs did not approve the general verdicts found in the court file on December 31, 1990. These forms contained 12 pages, 6 of which are cover pages and bear the name of the law firm Sinsheimer, Schiebelhut & Baggett, and Steven J. Adamski and Robert K. Schiebelhut, attorneys for all defendants, App.134a-139a. Therefore it is evident that the

defendants, their attorneys, or someone from defendants law firm had access to the locked evidence room at the Veteran's Memorial Building. The fact the law firm's cover pages were on the General Verdict forms indicates that they, and someone who had jurisdiction and the authority, opened the courtroom and evidence room and allowed the jury verdict forms to be switched, constitutes an act of conspiracy. Penal Code 182,184.

The trial transcript reveals that prior to the 9:00 a.m. in-chambers conference on January 2, 1991, Judge Conklin, out of court and off the record, had improper exparte communication with defense counsel and instructed him to prepare, "General Verdict forms as to each count", TT1599. Attorney Adamski presented these General Verdict forms, with Special Interrogatories at 9:20 a.m. The Minute Order of January 2, 1991 reflects that

"counsel for defendants hands the court General Verdict forms prepared this date." and entered at 11:13 a.m., App.44a. This is incorrect. As the transcript reveals, the in-chambers conference commenced at 9:15 a.m., TT1598. Defendants' General Verdicts are noted and transcribed on the second page after the conference started, TT1599, insufficient time to draft them after the conference started. These general verdicts were refused by Judge Chapman and entered into the court file.

A telephone conference was held at 9:30 a.m. with the trial judge, R. Donald Chapman, in San Jose, California. Judge Conklin was presiding in his chambers in San Luis Obispo, California.

Plaintiffs, having discovered the verdict forms had been switched, prepared and submitted, on January 2, 1991, "Proposed Special Findings Re: Negligence, Premises Liability, Breach of Contract and

Public Interest," App.147a. Judge Chapman rejected plaintiffs' special findings and instructed the parties to meet and confer to work up Special Verdicts and return to chambers at 1:30 p.m.

Defense counsel refused to work with plaintiffs so two separate sets of Special Verdicts were presented to the court at the 1:30 p.m. conference. Judge Chapman refused plaintiffs "Revised Proposed Special Findings", App.151a, and accepted Defense counsel's set.

On December 28, 1990, the trial court presented the original special verdict forms to the jury, in the jury room at 4:45 p.m., in the temporary courtroom in the Veteran's Memorial Building; a second set, for one finding, compensatory damage, was presented to the jury at the main courthouse in Judge Conklin's jury room, at 9:00 a.m. on January 2, 1991; and thereafter at 2:30 p.m. the court asked

the jury to surrender the second set, TT1629, and gave the jury a final set of "Special Verdicts" at 2:40 p.m. on January 2, 1991, App.46a. The jury had three different sets of verdict forms in their possession at various times. These changes were prejudicial and irritated and confused the jury.

The switching of jury verdict forms was not a simple error. The court kept the jury waiting from 9:00 a.m. until 2:40 p.m. in their efforts to erase the crime that had been committed. Even though the court, the trial judge, and the attorneys, as officers of the court had been advised of this crime against public justice, no investigation or disciplinary action has taken place.

On December 28, 1990, the trial judge charged the jury with defendants' requested jury instruction, "Exculpatory Clause in Contract As a Defense," App.211a, and

refused petitioners' requested, "Exculpatory Clause in Contract Not a Defense" App.118a.

On or about May 1, 1991, the court reporter requested petitioners come to the Veteran's Memorial Building to assist her with some of the sailboat terms, with which she was having difficulty. When we arrived she was unable to get into the locked evidence room which contained her original notes from the trial, because the lock had been changed and all the keys had been called in and no one had a key to the new lock except the trial court clerk.

The matter of switched verdict forms was brought to the attention of the court of appeal on October 11, 1991 in AOB 33-35 and January 10, 1992 in ARB section 3.9, P.16.

On November 18, 1992, at oral argument, appellants brought the matter of switched verdict forms to the Honorable

Steven Stone, Presiding Justice, Arthur Gilbert and Kenneth Yeagan, Associate Justices of the Court of Appeal, citing California Government Code 6200 and 6201, App.196a, dealing with stealing, destruction, wilfully altering or falsifying public records and further brought to the court's attention Penal Code Title 7, Chapter 4, Subdivision 115, Forging, Stealing, Mutilating, and Falsifying Judicial and Public Records and Documents, and Penal Code 182,184, App 197a-201a.

The crime against public justice was explained in detail to the appellate court with copies to the California Supreme Court in Appellants' Petition for Rehearing, Point I, filed December 23, 1992.

The misconduct of the lower courts and attorneys in their failure to report to the proper authorities the altering of public records, was again brought to the

attention of the California Supreme Court in Petitioners' "Petition for Review", Point I filed January 18, 1993.

The trial court refused to call defendant Port San Luis Harbor District, or its designated agent, to the stand even though plaintiffs had served a subpoena on the District to appear at trial and produce documents. The defendants were united in interest and did not give separate answers to the complaint. This case was filed before the California Fair Responsibility Act of June 4, 1986 (Prop.51) was enacted and liability of defendants is joint and several, App.___. The court of appeal refused to address these issues in their opinion.

Both lower courts denied plaintiffs' expert witness fees and refused to address plaintiffs' California Code of Civil Procedure section 998 compromise offer of $83,999 which defendants rejected and

thereafter defendants failed to receive a better judgment, App.48a. Both lower courts misapply California Code of Civil Procedure section 998(d), App.192a. This was first brought to the attention of the lower court on January 4, 1991 in Plaintiffs Memorandum of Costs and at post trial hearings on March 12, 1991, then to the Court of Appeal in AOB 20-21.

At post trial hearings on March 12, 1991, the trial judge did not correct the inconsistent verdict, which was brought to the lower court's attention in Plaintiffs' Motion for Judgment Notwithstanding the Verdict, filed February 19, 1991, and to the attention of the Court of Appeal in AOB 16-18.

The trial court read to the jury instructions on criteria for a jury finding of enforceability of the exculpatory clause of defendants' contract. Thereafter the trial court made a definitive

ruling that the clause was not valid and was against the policy of the law. Having rendered the decision, as a matter of law, the trial judge did not inform the jury of its decision nor did it withdraw the question of enforceability from the verdict forms. The court of appeal did not address these facts, upheld the lower court ruling that the exculpatory clause is invalid but refused to publish the opinion affecting a public entity, App.42a.

After the jury rendered a verdict as to breach of contract and enforceability of the exculpatory clause of the contract on January 2, 1991, then on March 12, 1991 the lower court ruled this a tort action and not contract action at post trial motion hearings, AA5127, 5135.

The trial court's ruling on the exculpatory clause was untimely. Plaintiffs' request for a timely ruling on December 3, 1990, in their In Limine

Motion, App.95a, was brought to the attention of the Court of Appeal in ARB 36-42, AA3466.

Defendants refused to launch plaintiffs' vessel/home thereby detaining plaintiffs from October 11, 1985 through March 22, 1986, AA 3086. The special verdict form presented to the jury did not contain a question for a finding of loss of use, detention, of plaintiffs' property or diminution in value. This issue was brought to the lower court's attention during the trial, and in plaintiffs' Objection filed on January 2, 1991, App.209a, and to the court of appeal's attention AOB 9-10. The lower court determined plaintiffs' claim of emotional distress was loss of use but nevertheless restricted loss of use to time of repair.

The trial court having instructed the jury on diminution, modified Baji 14.20, it failed to include a question to the

jury for diminution in value in the verdict forms. The issue of diminution was brought to the lower court's attention in plaintiffs' Trial Brief on December 3, 1990 and to the court of appeal's attention, AOB 12.

The trial court sanctioned plaintiffs excessively on May 30, 1989 because plaintiffs opposed a 6th inspection of their vessel/home four years after the accident, when no further damage was claimed.

REASON FOR GRANTING WRIT

The Court of Appeal Opinion, App.1a, which petitioners seek to have reviewed, is dated December 9, 1992 and became final April 5, 1993.

LOWER COURT'S WAFFLING IN DECISIONS OF LEGAL ISSUES

This case concerns the right of a citizen to a fair and impartial proceeding through the courts. Reasons for granting this writ is to correct the various injus-

tices perpetrated against petitioners, not the least of which is the court denying petitioners proper representation. Granting motion to withdraw to petitioners' counsel 70 days before trial was prejudicial and deprived petitioners of a constitutional right and forced petitioners, on such short notice, to represent themselves at trial. Turner v. State of La. La 1965, 85 S.Ct. 546, 379 U.S. 466, 13 L.Ed.2d 424.

"Reviewing a case in which Federal Constitutional Rights were denied, the United State Supreme Court must inquire not merely whether those rights have been denied in express terms but also whether they have been denied in substance and effect, and must review independently both legal issues and those factual matters with which they are commingled. "Oyama v. State of California, Cal. (1984) 68 S.Ct. 209, 332 U.S. 633, 92 L.Ed. 249.

The Federal issue was presented to the Court of appeal in Appellants' Petition for Rehearing, filed December 23, 1992, and denied January 5, 1993 and to the California Supreme Court in Petition for Review, filed January 18, 1993 and denied May 31, 1993. Appellants presented to the Supreme Court the unjustified omission, in the Appellate Opinion, of the appellate court's failure to render a decision on issues presented, denying petitioners a constitutional right, therefore reviewable in the United State Supreme Court by certiorari. Nashville, C.&s. L.R. Co. v. Wallace (1933) 288 U.S. 249, 77 L.Ed. 730, 53 S.Ct. 345, 87 ALR 1191.

"No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefore be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows

expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented. "Super Tire Engr. Co. v. McCorkle, 550 Fed.2d 903, (1977) citing New York ex rel, Bryant v. Zimmerman, 278 U.S. 63, 67, 73 L.Ed. 184 (1928), quoted in C. Wright Federal Courts Section 107, at 541, (3rd Ed. 1976).

Here, the concept of judicial accountability required the court of appeal give full consideration to all the issues. The record clearly shows appellants' Petition for Rehearing, draws in question the constitutional issue of the court's failure to perform their judicial duty.

Omissions of decision of law can only be interpreted as a constitutional issue depriving petitioners of due process and equal protection of the law pursuant to Article I and VI, Section 13, (formerly 4½) of the Constitution of the State of

California, as to violate the Fourteenth Amendment to the Constitution of the United States.

If the act complained of is error, then this court has jurisdiction to review plain error, unchallenged in the state courts, when necessary to prevent fundamental unfairness. Wood v. Georgia, 450 U.S. 261, 265,67 L.Ed. 220, 101 S.Ct. 1079 (1981). See also Vachon v. Hampshire, 414 U.S. 478, 38 L.Ed.2d 666, 94 S.Ct. 664 (1974).

Here, the Federal issue, though raised, was not decided by either the Court of Appeal or the California Supreme Court. In Super Tire, supra p.907, the court held, "...more elementally, the basic jurisprudential fact that not to decide is to decide." Federal rights "are denied as well by refusal of the state court to decide the question as by an erroneous decision of it." Lawrence v.

State Tax Commission, 286 U.S. 276, 282, 52 S.Ct. 556, 558, 76 L.Ed. 1102 (1932).

As the California Supreme Court held in McClatchy v. Superior Court (1897) 119 C 413, 420, 51 P 696, discussing Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215, quoting Windsor v. McVeigh, 93 U.S. 277, 278, "....It would be like saying to a party, "appear and you shall be heard", and when he has appeared, saying your appearance shall not be recognized, and you shall not be heard." Here, as in Windsor, supra p. 278, the court in effect did this, with the result petitioners had no hearing at all on the issue.

Here, the appellate court departed from those recognized and established requirements of law, and failed to render a decision on issues presented. This was more than prejudicial error,it was a transgression of a fundamental right guaranteed to every citizen, the guarantee of

procedural fairness under the due process and equal protection clause of the Fourteenth Amendment. The court held in Postal Teleg. Cable Co. v. Adams, 155 U.S. 689, 698, "any departure from the recognized and established requirement of law, however close to apparent adherence to mere form in method and procedure, which has the effect to deprive one of a constitutional right, is as much an excess of jurisdiction as where their exists an inceptive lack of power." The California Supreme Court has held, an act in excess of jurisdiction is reviewable on certiorari, McClatchy, supra p. 421.

The Court of Appeal's omission of petitioners' arguments and refusal to render a decision on the issues of court and counsel's judicial misconduct and erroneous jury instructions on causation are acts in excess of its jurisdiction, and thereafter proceeded to judgment, with

the effect of denying petitioners due process. Actions of the lower courts should be set aside as a proper decision on the issues would mandate reversal of the trial court's judgment of denial of petitioners' motion for new trial, Aa 4603-06, 4957-5036, and judgment notwithstanding the verdict, Aa 4607-31. Country Club Tower Corp. v. Tower Management Corp. D.C. Mont. 1967, 275 F Supp 468. See Armstrong v. Manzo et ux 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965); Brenkerhoff-Faris Trust and Savings Co. v. Hill 281 U.S. 673, 505 S.Ct. 451, 74 L.Ed 1107 (1930).

The appellate court in its decision, not to render a decision, Lawrence supra, p.282, has given effect to the fact the court of appeal misconceived the meaning of the California Supreme Court decision in Mitchell v. Gonzales 54 Cal3d 1041, 1CR2d 913, (Dec. 1991), cited in petitioners' briefs and controlling in this

case, where erroneous causation instructions requires reversal of the judgment. Where the lower courts misconceived the meaning of a Supreme Court decision, is grounds for granting certiorari. Wilkerson v. U.S. Ga. 1961, 81 S.Ct. 567, 265 U.S. 399, 5 L.Ed.2d 633.

Here, the appellate court deviated from established doctrine of stare decisis where case law is directly on point. This doctrine requires that precedent be followed. Stare decisis is a judicial policy requiring the lower courts to follow established precedent and a jurisdictional limit in the power of the lower courts. Under California law a decision rendered in violation of it is void, Auto Equity Sales v. Superior Court, (1962) 57 c.2d 450, 455, 20 CR 321, 323, 20 Am.Jur.2d 183-184; Cal. Civil Appellate Practice 2ed. 1985, 4:42, 4:43. United States v. Union P.R. (1879) 97 U.S. 569, 25 L.Ed.

143. Therefore refusing to render a decision on the issue presented in appellants' pleadings prima facie conflicts with the decision of the Supreme Court on the same point of law.

Under Federal procedures federal courts are bound to follow decisions of the highest court of the state, Huddleston v. Dwyer (1944) 322 U.S. 232, 88 L.Ed. 1246, 64 S.Ct. 1015. Therefore the ruling in Mitchell is controlling. By any standard of review petitioners were denied a statutory right under article VI, Section 13 of the California Constitution as to violate the due process and equal protection clause of the Fourteenth Amendment.

Petitioners contend the appellate court exceeded its jurisdiction and the "harmless error" rule of Article VI, Section 13 was given no effect in an effort to evade the underlying constitutional mandate of fundamental fairness. Cooper

v. State of California 386 U.S. 58, 17 L.Ed.2d 730, 87 S.Ct. 788. See Chapman v. California (1967) 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824.

In People v. Watson, 46 Cal2d 818, 299 p2d 243, the court undertook a general discussion of the application of the state's harmless error rule. Wherein it held reversal would be required only when "it is reasonably probable a result more favorable to the appealing party would have been reached." People, pp. 835-837.

Here, the error is clearly evident and the appellate court failed to review the substantial evidence and undisputed expert testimony that clearly reveals a judgment more favorable to petitioners on premises liability and breach of contract would have been reached but for the error.

The trial judge's statement prior to jury deliberation, confirms such a result, (1) "the jury had evidence that the open

sea facility was dangerous," TT 1611; (2) "there was ample evidence for the jury to find both premises liability and individual negligence," TT 1612.

If the trial judge had appeared in court and presided on January 2, 1991, the 9th day of trial, he would have known the jury verdict for breach of contract and premises liability were inconsistent and clearly wrong and that his refusal to give petitioners' requested jury instructions, Baji 3.77, 3.78, 3.80, App.204a-206a, "Concurrent Causes", indeed resulted in a miscarriage of justice.

Here, as in Mitchell, the jury found negligence but no causation. The complaint, evidence and trial briefs disclosed allegations of multiple concurring causes of the injury. Instruction, Baji 3.76, app.207a, a cause in fact instruction, directed the jury to a single specific cause of the injury, removing from the

jury, after finding negligence, consideration of other causes of the injury and negligent conduct of those whom petitioners allege were erroneously dismissed and no longer joined as a party. In light of the facts presented at trial the jury instructions was an improper charge and plainly wrong. It did not fully and fairly state the law of the case, but confused, misdirected and limited the jury, depriving petitioners of a fair trial. Kotteakos v. United States (1946) 328 U.S. 750, 90 L.Ed. 1557, 66 S.Ct. 1239. The issue herein presented goes to jurisdiction and grounds to grant certiorari. McClatchy, supra p. 421. Harrington v. Calif. (1969) 395 U.S. 250, 23 L.Ed.2d 284.

The trial judge compounded the error when on January 2, 1991, during a conference call with the parties and Judge Conklin, in chambers, prior to jury deli-

beration, he made a definitive ruling the exculpatory clause of defendants' contract was invalid. The trial judge, as it appears in the transcript, stated: "Start out with the exculpatory clause. That's ...I ruled as a matter of law that the exculpatory clause is invalid as not being in the public interest. And then I ruled on it as a matter of law." Judge Conklin, presiding in chambers and sitting in Judge Chapman's absence, confirmed the ruling by responding, "Right". TT 1607. although the trial judge made conflicting statements, the ruling was recorded as evidenced in the January 2, 1991 Summary of Minute Order, App.44a.

Throughout 8 days of trial, the trial judge refused to rule on the exculpatory clause, as a matter of law, as requested in petitioners' Motion in Limine, Item No. 3, filed on December 3, 1990, app.95a.

Had the trial judge made the deter-

mination timely, on the first day of trial, December 3, 1990, the jury would not have been exposed to prejudicial testimony and evidence. Petitioners contend the trial judge's overt acts were biased and deprived petitioners of a fair trial.

Notwithstanding the prejudicial effect of the trial court's action or inaction after rendering its ruling, the appellate court's failure to render a decision and follow established precedent on the issue of erroneous jury instruction con-stituted such discrimination against petitioners as to violate the due process and equal protection clause of the Fourteenth Amendment and grounds for granting certiorari.

The lower courts, in their refusal to address the issue of irregularity and render a decision on unlawful interference with procedures of the court is an act in

excess of their jurisdiction, Lawrence, supra p. 282. Petitioners being forced by the court to present their own case at trial were not fully apprised of the court's judicial obligation to investigate and impose sanctions on those involved in the unlawful removal of verdict forms from the court file, U.S. v. Walasek, C.A. Pa. 1975, 527 F2d 676, USCA, Title 18, Section 1505, App.235a. Twelve pages of special verdict forms, approved by the parties, and presented to the jury, for each cause of action contained in petitioners' complaint, TT 1593, and a finding, by the jury on the legal issue of enforceability of the exculpatory clause of defendants' contract, were removed from the evidence room and replaced with a general verdict form with a single finding, compensatory damage, app.134a-139a. This constituted an act of conspiracy to defraud and deny petitioners due administration of justice

and a fair trial. U.S. Solow, D.C. N.Y. (1956), 138 F Supp 812, USCA Title 18, Section 1503, App.234a.

Such irregularity is a crime depriving plaintiffs of due process and a fair trial and is a crime against public justice. The act altered public records, tampered with the jury, and unlawfully interfered in court proceedings, constitutes such discrimination as to violate due process and equal protection clause of the Fourteenth Amendment.

The courts of the State of California deprived petitioners equal protection under the law when, after the crime of switching the verdict forms the court failed to investigate and allowed the crime to go unpunished. If citizens cannot rely on the courts to do their judicial duty and fulfill their obligations to the public it becomes of concern to a sufficient number of people to warrant review

by the United States Supreme Court.

The trial court presented the original special verdict forms to the jury, in the jury room of the temporary courtroom in the Veteran's Memorial Building at 4:45 p.m. on December 28, 1990, TT 1593; a second set, for one finding, compensatory damage, was presented to the jury at the main courthouse in Judge Conklin's jury room, at 9:00 a.m. January 2, 1991. These general verdict forms for compensatory damage, App.134a-139a, were in the jury's possession for 5½ hours when the court asked the jury to surrender them at 2:30 p.m., app.45a. The jury was given the fourth and final set, Special Verdict Forms at 2:40 p.m. on January 2, 1991. The third set, "General Verdict with Special Interrogatories," drafted by defense counsel, at Judge Conklin's direction was filed in the record, app.140a.

The effect of the initial unlawful act, caused multiple, different and misleading jury verdict forms to be presented to and withdrawn from the jury. This irregularity caused irritation and confusion and misdirected the jury.

In the face of this misdirection and the circumstances of the case it cannot be assumed this was a harmless error, but a transgression of a constitutional right of procedural fairness as to violate due process and equal protection clause of the Fourteenth Amendment, making applicable Article VI, Section 13, of the California Constitution. The issue here goes to jurisdiction and grounds for granting writ of certiorari, McClatchy, supra 421. Review of the United States Supreme Court is required to prevent fundamental unfairness, Woods, supra 265.

LOWER COURT'S FAIL TO APPLY PRECEDENT

The Law and Motion department of the

Superior Court granted defendants' motion barring petitioners' a trial on the merits as to their emotional distress claims alleged in their complaint. The court ruled petitioners' emotional distress claim, "Are barred by the Tort Claims Act," App.51a.

The shield against lawsuits provided for the government by the California Tort Claims Act expressly excludes actions arising under contract, California Government Code Section 814. Longshore v. Ventura County (1979) 25 C3d 14, 157 Cr 706. Here the court misconceived the meaning of Section 814, App.185a. The legislative committee comments read in part: "The doctrine of sovereign immunity has not protected public entities in California from liability arising out of contract. This section makes clear that this statute has no effect on the contractural liabilities of public entities and

public employees." Therefore the complaint and cross-complaint for breach of contract makes inapplicable the "Tort Claims Act" as a bar to a cause of action for emotional distress. The issue before the court was defendants' claim that petitioners had failed to file a claim for emotional distress. The court erred in its decision and failure to follow established precedent constitutes an act in excess of its jurisdiction therefore void.

The appellate opinion's misstatement of law and fact is also error, an act in excess of their jurisdiction. The California doctrine of stare decisis requires a precedent be followed. A decision rendered in violation of it is void, Auto Equity, supra, p. 455.

Here, both lower courts failed to follow established precedent and misconceived the meaning of the California

Supreme Court decision in Wilson v. San Francisco Redevelopment Agency, 19 C3d 555, 138 CR 377. The precedent established in Wilson is clear and the San Luis Obispo County Superior Court subsequently upheld the grounds in Wilson as established precedent. In Cavalier Acres, Inc. v. San Simeon Acres Community Services District, 151 CA3d 798, 199 CR 4 (June 1984), this court held "Although the claim may have been defective here, Wilson teaches us that a public agency's failure to comply with Government Code Section 53051 entitles claimant to ignore the claim filing requirements entirely."

A review of the record reveals defendant District was not in compliance with registration requirements of the Roster of Public Agencies, pursuant to California statute, Government Code 53051, App.162a, and fully admitted in their pleadings that a Statement of Fact was not

filed with the County Clerk in 1985 and the 1984 statement on file was so inaccurate as not to be in substantial compliance.

To deny petitioners a trial on the merits of their emotional distress claims, based on the misstatement of fact and failure to follow precedent, is a miscarriage of justice and constitutes such discrimination as to violate due process and equal protection clause of the Fourteenth Amendment.

In the instant, petitioners contend the appellate court misconceived the meaning of the Supreme Court decision in Wilson and a writ should issue as the decision in Wilson is controlling in petitioners' case, and subject to review by this court, Wilkerson, supra p. 636.

LOWER COURT'S FAILED TO UPHOLD STATE STATUTES AND PROTECT CONSTITUTIONAL GUARANTEES

The judgment entered by the trial judge made the determination that petitioners are the prevailing party in the action, App.49a.

FAILED TO UPHOLD STATE STATUTES DENIES CONSTITUTIONAL RIGHT

The judgment entered by the trial judge made the determination that petitioners are the prevailing party in the action, App.49a, TT 5127.

Under California law, the only requirement to bring California Civil Code 1717, app.159a into operation is that one of the parties becomes the prevailing party in the action. Beneficial Standard Properties v. Scharps (1977) 67 CA3d 227, 232, 136 CR 549.

Subsequently, the trial court denied the statutory right of recovery of attorney's fees and other costs pursuant to the contractural agreement. Bussey v.

Affleck (1990) 225 CA3d 1162, 1165, 1167, 275 CR 646, Code 1717 necessarily assumes, as here, a contractural agreement pursuant to California Civil Code 1021, App.195a, and makes reciprocal the award of attorney's fees and costs of a unilateral contract agreement, an allowable cost under California Code of Civil Procedure 1032, App.163a, authorized by Section 1033.5(10)(A)(a) and (10)(B)(a), App.165a.

The trial court committed material prejudicial error and the appellate court failed to exercise its discretion in denial of statutory right of election of remedies doctrina. Both lower courts misinterpreted newly amended staatutes and erroneously upheld the trial judges construction of the law. Hernandez v. Garwood (1980) Fla. 390 So.2d 357. The trial judge stated, "There is no statute that allows for attorney fees in tort action. The fact duty arise, (sic) in

contract doesn't give either party the right to claim their attorney fees in this matter," TT 5134-35. The lower court's decisions are inconsistent with determinations to the contrary. Witkin, the leading text writer on California law has succinctly assessed to the contrary. See 3 Witkin Cal Procedure 3rd (1985), Actions, Section 122, App.176a. Here, the negligent violation of the contract does not make this a tort action. Allegations in the complaint and cross-complaint make the "gravaman" of the action, damages for breach of contract. 3 Witkin 3rd Ed. (1985) Actions, Section 119, App.167a, and 1992 Supp App.174a. See also 7 Witkin Cal Pro, 3rd 91985) Judgments, Section 152, 153, App.180a.

Failure of the courts to adhere to established law and statutes invalidate such statutes and constitutes such discrimination against petitioners as to

violate the due process and equal protection clause of the Fourteenth Amendment. Atlantic Coast Line R. v. Phillips, Gs. 1947, 67 S.Ct. 1584, 332 U.S. 168, 92 L.Ed. 1977, 173 ALR 1.

The lower court's misinterpretation of applicable state statutes and failure to exercise its authority is an act in excess of its jurisdiction denying petitioners' rights guaranteed by the constitution and is grounds for granting writ of certiorari for review by the U.S. Supreme Court. Louisiana R. etc. Co. v. New Orleans, La. 1914, 35 S.Ct. 62, 235 U.S. 164, 59 L.Ed. 175.

The lower court's misinterpretation and failure to uphold state statutes denied petitioners' rights guaranteed by the Constitution and is grounds for granting a certiorari by review by the United States Supreme Court. Louisiana R. etc. Co. v. New Orleans, La 1914, 35 S.Ct.

62, 235 U.S. 154, 59 L.Ed. 175.

The appellate opinion misstates the facts and misinterprets the issues presented, App.12a. It is not required the jury sift through various codes as listed on plaintiffs' requested jury instruction Baji 3.45, TT 1610. It is the judicial obligation of the trial judge to discuss jury instructions with the parties in order to prevent an injustice. Here, at the direction of the trial judge at the out of court jury instruction selection, petitioners were directed by the trial judge to list and supply copies of all codes and statutes relevant to the case. Having done so, the trial judge refused to allow argument, discussion or selection of specific Safety Orders and Statutes that were applicable. The trial judge failed in the performance of his judicial duty to prevent an injustice due to petitioners

inadvertance. Taylor v. Bell 21 CA3d 1002, 98 CR 855.

The appellate opinion also erred in the interpretation of evidence presented at trial as it relates to Baji instructions 11.53, App.208a. All statutes, safety orders and evidence presented at trial concerned the Mobile Boat Hoist Facility specifically. The court refusal to give petitioners' proffered instruction 11.53 identifying that facility was error. In light of other numerous instructions relating to dangerous condition of public property proffered by defendants and accepted by the court, the identity of the specific facility alleged to be a dangerous condition of public property was proper. Therefore, refusal of petitioners' jury instructions denied petitioner a constitutional right of jury consideration of a specific nature, and constitutes such discrimination against petitioners as to

violate due process and equal protection clause of the Fourteenth Amendment. Naupe v. People of State of ILL., ILL 1959, 79 S.Ct. 1173, 360 U.S. 264, 3 L.Ed.2d 1217.

Here, petitioners, in propria persona, were not only denied due process, the constitutional right of a hearing on the Bailment cause of action allaged in the complaint Oyama, supra p. 254, but were denied equal protection of the law when the trial judge committed wilful and prejudicial misconduct in the performance of his judicial duty in failing to prevent a miscarriage of justice. The action of the trial judge reflects favoritism and partiality toward Defendant District, a public entity, making applicable Article VI, Section 13 of the California Constitution, App.191a.

Although the trial judge is not required to act as counsel for lay persons representing themselves, it is his duty to

see that a miscarriage of justice does not occur through inadvertance. Taylor v. Bell (1971) 21 CA3d 1002, 1008, 98 CR 855, 859.

The actions of the trial judge was instrumental in denying petitioners a ruling on the bailment cause of action. The trial judge informed petitioners, in chambers:

> "You will lose your negligence cause of action if you don't drop common carrier".

By design, this statement coerced petitioners to unintentionally withdraw common carrier, count 2, of the Bailment cause of action. AA8.

The trial judge's statement, without further explanation failed to fully inform petitioners his true meaning, bhat "strict liability" would issue under the bailee/bailor relationship of the bailment contract. Petitioners, as a result of the judge's statement unintentionally withdrew common carrier. Wuest v Wuest (1942) 53

CA2d 339, 127 P2d 934.

At the in-chambers conference on December 3, 1990 the trial judge heard defense counsel contradict defendants answer to the complaint when he admitted that Defendant District is a common carrier. Defendants reversed their position and made clear their intent to claim common carrier status. App.215a-232a. The trial judge, with knowledge of the common carrier status, by inference encouraged and thus caused petitioners to unintentionally withdraw Count 2, Common Carrier of the Bailment cause of action. Such action was to deny petitioners an important, substantive, and procedural right. Here, the trial judge committed prejudicial misconduct in departing from his judicial duty and failed to prevent a miscarriage of justice. Judicial misconduct was so prejudicial objection is not required. Etzel v. Rosenbloom (1948 83

CA2d 758, 189 P2d 848.

On December 27, 1990, petitioners brought to the trial judge's attention Defendant District's admission of common carrier status upon filing, "Proposed Jury Instructions Requested by Plaintiffs: (1) Exculpatory Clause/Assumption of Risk; (2) Strict Liability, App.114a. These instructions were refused.

The trial judge, in direct conflict with a judicial duty, failed to avert a miscarriage of justice and failed to see that the jury was fully and fairly instructed on common carrier, on the issue of bailment and see that the issue was presented to the jury.

The repeated waffling of the judge and indecision to rule as a matter of law on the legal issue of enforceability of the exculpatory clause of defendats' contract was highly prejudicial. Here the jury was to hear reference to the clause,

other testimony, and instruction as a defense when in the end the court sustained petitioners position that the clause as a defense is unavailable and the fact and operation of the clause inadmissable, TT 1607.

This issue would have been averted had the trial judge made a timely ruling in response to petitioner's In Limine motion on December 3, 1990, App.95a. Had the ruling been timely a judgment more favorable to petitioners would have resulted, and the trial judge would not have felt compelled to coerce plaintiffs into dropping common carrier and bailment cause of action would have gone to the jury. It was misconduct for the trial judge to usurp the fact finding function of the jury. Langdon v. Superior Court (1923) 65 CA 41, 223 P 72. By the actions of the trial judge petitioners were denied a hearing on the bailment cause of action of

the complaint and on petitioners' theory of defendants strict liability as a common carrier. This was not just harmless error and made applicable Article VI, Section 13 of the California Constitution.

The appellate court misinterpreted the facts as they appear in the record and gave no effect to the trial judge's failure in his judicial duty that denied petitioners a constitutional right as to violate due process and equal protection clause of the Fourteenth Amendment.

JURY NOT FULLY INSTRUCTED ON THEORY OF LIABILITY

It was established at trial petitioners vessel was damaged and could not be restored to its original condition. It was further established that the vessel was detained in defendants' boatyard between October 11, 1985 and March 22, 1986 by defendants' refusal to launch the vessel. During the period of detention the vessel was unable to be used for its in-

tended purpose. Here, the trial judge refused petitioners modified jury instruction, Baji 14.22 for reasonable value of the loss of use of plaintiffs' personal property during the period of detention, App.209a, and gave instead instruction Baji 14.22 as written, for only time reasonable and necessary for repairing the damage. The jury was also instructed as to diminution, Baji 14.20, page 2 only.

On December 28, 1990, neither party had prepared jury verdict forms. The trial judge drafted and had defense counsel prepare special verdict forms of the issues to be presented to the jury. Here, the trial judge erred and failed to check for completeness and adequacy of jury instructions. This may be particularly appropriate if one of the parties is appearing in propria persona. Taylor, supra p. 1008.

The trial judge instructed the jury

as to breach of contract measure of damage, TT 1584-86. Although the jury was instructed as to loss of use and diminution the special verdicts failed to differentiate or present to the jury for consideration damages other than breach of contract damages. Without specific questions for jury determination as to loss of use and diminution in the special verdict forms, limited the jury consideration to property damage alone. Here, the error of the trial judge denied petitioners a fair trial and the guarantee of procedural fairness as to be violative of due process and equal protection clause of the Fourteenth Amendment.

The trial court, in dismissing all defendants except the District and Jack Rodin, Jr., denied petitioners due process, equal protection and procedural fairness guaranteed under the Fourteenth Amendment. The application of the Fair

Responsibility Act of June 4, 1986, (Proposition 51), abolished the principle of joint and several tort liability in California. In Russell v Superior Court, (1986 1 Distr.) 185 CA3d 810, 230 CR 102. In this case the court ruled California Civil Code 1431.2(a) is not retroactive, and may be applied only to causes of action which occurred on or after its effective date of June 4, 1986. Therefore in the present action, liability of defendants is joint and several. On May 31, 1988, petitioners filed Motion for Determination of Undisputed Issue Declaring the Fair Responsibility Act of 1986 is Not Retroactive and is Not Applicable in This Case, Aa 417. The court failed to make a ruling, instead had the attorneys of record, in open court, stipulate that California Civil Code Section 1431.2 was not applicable and liability would be joint and several. The

court failed to rule on the motion as a matter of law.

On April 17, 1986, petitioners filed suit against multiple defendants on the theory of joint and several liability. It is settled in California that tort action, when two or more persons have been concerned in the commission of the tort, the injured party may proceed either jointly or severally aginst such tort feasors who are jointly and severally liable and where, as here, the complaint alleged only joint negligence on the part of the joint tort feasors it nevertheless states a complete individual liability against each party so sued on account of the single act which the complaint presented. Shea v. City of San Bernardino, 7 Cal2d 688, 693-94, 62 P2d 367 (1963).

Where as here, petitioner sues a negligent agent or employee, joining his master, principle or employer as a defen-

dant on the theory of respondeat superior a separate count can be alleged against each. Defendants sued upon a theory of joint and several liability, each is potentially liable for the full amount of any judgment.

The trial judge was informed of joint and several liability, App.108a, and petitioners offered instructions on the issue, TT 1552. Here, the trial judge determined Proposition 51 as inapplicable and thereafter refused to give petitioners' proffered instructions or draft on his own motion, an applicable instruction.

The trial judge, in refusing to instruct the jury on joint and several liability worked a modification of liability and diminished the total available damages. The actions of the trial judge was prejudicial and his failure to see that the jury was fully instructed was misconduct. Taylor, supra p. 1008, California

Code of Civil Procedure 607(a). The trial judge failed to prevent a miscarriage of justice in his refusal to instruct the jury on joint and several liability as petitioners had requested deprived petitioners of substantial rights and diminished individual defendants total liability to make applicable Article VI, Section 13, of the California Constitution.

Further, the court in Russell did not determine the constitutionality of Proposition 51 or interpret its substantive provision. Petitioners here allege the Fair Responsibility Act of 1986 is unconstitutional as the court applied it in this case, therefore 28 USC 2403(b) may be applicable. Under California law, a plaintiff clearly has a right to sue a negligent servant, agent, or employee, joining his master, the principle, or employer as a defendant on the theory of

respondeat superior and maintain a separate account appropriately alleged such whether in tort or in contract, People v. Edwards 9 Cal. 286 (1958).

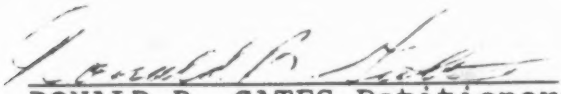
Here, the trial judge committed prejudicial misconduct in refusing to properly instruct the jury on liability and applied and give effect to an inappropriate California statute petitioners herein allege is unconstitutional as to violate due process and equal protection clause of the Fourteenth Amendment.

CONCLUSION

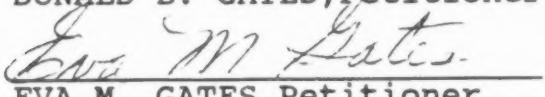
The foregoing reasons, if action or inaction of the lower courts infringe upon the constitutional rights of a single citizen it reflects upon the conerns of all citizens. Petitioners respectfully pray that their petition for writ of certiorari be granted. In the event that the Petition is granted, petitioners pray that the judgment of the Court below be rever-

sed, that the cause be remanded, and that the court below be directed to grant a new trial on the issues presented on appeal.

Respectfully submitted,



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DATED: July 12, 1993